STATE OF MICHIGAN

COURT OF APPEALS

JOHN PERKINS, Plaintiff-Appellant,	UNPUBLISHED June 19, 2014
v	No. 312936 Wayne Circuit Court
MID-MICHIGAN RECYCLING, L.L.C., Defendant-Appellee.	LC No. 11-007491-NO

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals from the trial court order that granted summary disposition in favor of defendant on his negligence claim under MCR 2.116(C)(10). For the reasons set forth below, we affirm in part and reverse in part.

The facts of this case are not in dispute. Defendant recycles wood into wood chips and uses the services of a number of independently contracted drivers to transport these wood chips to a local power station. Plaintiff is one of those drivers. On August 19, 2010, plaintiff drove to defendant's location to pick up a load of wood chips. Finding a portion of the property locked, defendant climbed into the cabin of a pay loader,[1] where he expected to find the key to the gate.[2]

The pay loader was constructed with a metal ladder that allows access to the cabin. The ladder has two sections. Several steps are immovably affixed to the pay loader. However, the step closest to the ground is known as a "swing step." The swing step is also metal but is not immovable. Rather, it is attached to the pay loader with rubber straps and is designed to be flexible so that it can swing out of the way if it comes in contact with obstructions. Defendant does not dispute that because it is attached by straps, a swing step can be torn from the pay loader and that this is not an uncommon occurrence. Nor does defendant dispute that without the swing step in place, the lowest permanent step is situated 43 inches, nearly 4 feet, above the

[1] A "pay loader," otherwise known as a "front-end loader" or "bucket loader," is a wheeled heavy equipment machine used in construction and other industries to move or load heavy materials into or onto another type of machinery, e.g., a dump truck or conveyor belt.

[2] It is undisputed that plaintiff had the authority to retrieve the key and open the gate.

ground. It is undisputed that the pay loader involved in this case was missing its swing step and defendant further does not dispute that on multiple prior occasions, plaintiff advised it of the missing swing step and requested that it be repaired.

Plaintiff alleges that as he alighted from the pay loader, he fell due to the missing swing step and suffered serious spinal injury. His complaint asserted in separate counts that defendant was liable in ordinary negligence, premises liability, and nuisance. Defendant moved for summary disposition on all of plaintiff's claims under MCR 2.116(C)(10) and the trial court granted the motion, finding that plaintiff's claim sounded only in premises liability and that, because the missing swing step was an open and obvious hazard, defendant was entitled to judgment as a matter of law.[3]

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id*. at 509-510. All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

"Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Ernsting*, 274 Mich App at 510.

I. ORDINARY NEGLIGENCE CLAIM

Plaintiff's complaint alleged claims of both ordinary negligence and premises liability. Defendant argued, and the trial court agreed, that only plaintiff's premises liability claim applied to the factual situation at bar. While a premises liability claim does not necessarily foreclose other tort claims, *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005), we agree that only one of plaintiff's claims applies. However, contrary to the trial court's ruling, it is plaintiff's ordinary negligence claim, not his premises liability claim, that applies to the instant facts and it survives summary disposition.

[3] Defendant moved for summary disposition on plaintiff's nuisance claim. However, plaintiff did not respond to defendant's argument in his response to the motion or at the motion hearing, and appears not to challenge the trial court's nuisance ruling in favor of defendant before this Court. Accordingly, we decline to address that claim. MCR 7.212(C)(5); *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).

> Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise of the plaintiff's injury. *James*, 464 Mich at 18-19. [*Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012).]

The trial court erred by finding that plaintiff's claim did not sound in ordinary negligence. Defendant's potential liability does not arise from its duties as an owner, possessor, or occupier of land. *Id*. at 692. Rather, by failing to repair the swing step despite plaintiff's repeated requests that it do so, defendant allegedly breached its duty to maintain the *industrial vehicular equipment* with which plaintiff was required to work in safe, operable condition. This duty simply did not arise from defendant's ownership, possession, or occupation of the land on which plaintiff's injuries occurred, but arose from its ownership and possession of the pay loader.

In the analogous context of determining whether an instrumentality was "of a public building," our Supreme Court has indicated that a "fixtures" analysis is proper for "items of personal property that have a possible existence apart from the realty." *Fane v Detroit Library Comm*, 465 Mich 68, 77-78; 631 NW2d 678 (2001). In this case, the instrumentality of plaintiff's injury – the pay loader – could easily be driven away, sold, or otherwise removed from defendant's property and, therefore, has a "possible existence apart from" defendant's premises.

"An item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty." *Id*. at 78. There was no evidence that the pay loader was annexed to defendant's land or any buildings located thereon, that it was uniquely adapted or applied to the land, nor that it was intended as a permanent accession to the land. The pay loader was located on the premises and used there; however, this is not the same as annexation, defined in relevant part as: "the state of being attached" or "[t]he point at which a fixture becomes a part of the realty to which it is attached." Black's Law Dictionary (9th ed). The pay loader could be removed from the premises at any time and was in no way attached to the premises. Finally, there is no evidence in the record that the pay loader was intended as a permanent accession to defendant's premises. It could be driven away at any time without the need to detach it from the land or any structures located thereon.

We find that plaintiff's claim did not arise from defendant's duties as an owner, possessor, or occupier of the land where plaintiff was injured. We further find that the dangerous condition alleged by plaintiff was exclusive to the pay loader, not the land. Accordingly, plaintiff's claim sounded in ordinary negligence, to which the open and obvious doctrine does

not apply, *Laier*, 266 Mich App at 487-488, and the trial court erred by granting summary disposition in favor of defendant on plaintiff's ordinary negligence claim on that basis.[4] For the same reasons discussed above, plaintiff's claim did *not* properly sound in premises liability, and, therefore, the trial court did not err by granting summary disposition in favor of defendant on that claim.[5]

II. SIMPLE TOOL DOCTRINE

Defendant argues that even if plaintiff's claim sounds in ordinary negligence, defendant is shielded from liability pursuant to the simple tool doctrine. We disagree because defendant's duty under the facts of this case was not limited to the general duty to which this doctrine provides an exception. That general duty is to inspect and maintain its equipment in reasonably safe condition. Defendant does not claim, at least not for purposes of this appeal, that the pay loader was reasonably safe. However, it relies on the simple tool doctrine which limits its general duty as follows:

> The simple tool doctrine is an exception to the employer's duty to furnish her servant with reasonable safe machinery to perform the required work. *Sheltrown v Mich Central R Co*, 245 Mich 58; 222 NW 163 (1928). The Court in *Sheltrown* held that a master is "under no obligation to his servants to inspect during their use those common tools and appliances with which everyone is familiar * * *". *Id*., 63. The master's nonliability under the simple-tool exception rests upon the assumption that they employee is in the same, if not superior, position to observe the defect as the employer. [*Cressman v Wright*, 105 Mich App 194, 198; 306 NW2d 447 (1981).]

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[4] We disagree with plaintiff's assertion that defendant's failure to properly maintain the swing step violated MIOSHA regulations and gave rise to a statutory cause of action or breached a statutory duty in negligence. *Ghaffari v Turner Const Co*, 259 Mich App 608, 613; 676 NW2d 259 (2003), rev'd on other grounds 473 Mich 16; 699 NW2d 687 (2005). Nonetheless, "the violation of an administrative regulation constitutes evidence of negligence." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 721; 737 NW2d 179 (2007). Accordingly, while defendant's alleged violation of MIOSHA regulations does not *create* a duty in negligence, plaintiff may use the alleged violation as *evidence* of negligence. *Id.*

[5] The open and obvious doctrine applies to premises liability actions, not ordinary negligence claims. *Laier*, 266 Mich App at 487-48. Because we find that plaintiff's claim does not sound in premises liability, we decline to address his alternative argument regarding exceptions to the open and obvious doctrine, i.e., that the missing swing step constituted an "effectively unavoidable" or "unreasonably dangerous" condition.

According to plaintiff's deposition testimony,[6] defendant did not simply fail to meet its general duty nor did plaintiff fail to inspect the machinery he was to use. Rather, defendant affirmatively declined requests for repair and even instructed plaintiff not to make repairs to the ladder even though he volunteered to do so in order to render it safe. Plaintiff testified that he complained of the ladder's condition on three different occasions before he was injured. On the first occasion, "I told Aaron [defendant's manager] that he needed to get that step put back on there or somebody was going to get hurt. He said he would check on it." On the second occasion, he told the manager, "Aaron . . . you really need to get that step put on that machine, somebody's going to get hurt . . . You cannot lift yourself pretty near four feet in the air to climb up on this machine and then come back down." He complained a third time to the manager, pointing out the unsafe condition and stating, "you need to get this fixed," offering: "I'll buy it for you and put it on there if that's what you want." The manager told him not to do so, responding, "Nope, we have guys doing that. I'll check into it."

The caselaw presented by defendant seeking to fit this scenario into the simple tool doctrine is distinguishable and unpersuasive. Defendant relies primarily on *Pawlowski v Van Pamel*, 368 Mich 513; 118 NW2d 395 (1962). However, in that case, the plaintiff personally assembled the ladder, noted the defect, did not bring it to anyone's attention, and nonetheless elected to use it. *Id*. at 514-515. The same is true in *Cressman*, 105 Mich App at 194, on which defendant also relies. In that case, the plaintiff used a wash bench to get access to a scaffold and fell when the bench collapsed. *Id*. at 196. There was no claim that the plaintiff inspected the bench, let alone that he brought its defective condition to the attention of the defendant or was rebuffed when he sought to undertake repairs himself in order to render it safe. *Id*. In *Rule v Giuglio*, 304 Mich 73, 75-76; 7 NW2d 227 (1942), the plaintiff was injured when a wooden ladder broke. Unlike the plaintiff in the instant case, in *Rule*, the plaintiff failed to inspect the ladder before he used it, and certainly never brought it to the attention of the defendant or offered to fix it. *Id*.

The simple tool doctrine is a limited exception to a master's general duty to inspect, discover defects, and repair them. However, it does not provide an exception to a master's duty to respond to the affirmative safety complaints of a servant who has taken it upon himself to inspect the tool, discovered its dangerousness, and brought it to the attention of the master. It certainly cannot serve that role where the servant has offered to repair the tool he must use and the master directs him not to do so. Accordingly, defendant is not entitled to summary disposition on plaintiff's ordinary negligence claim on the basis of the simple tool doctrine.

[6] Again, when reviewing a trial court's ruling on a summary disposition motion brought under MCR 2.116(C)(10), we view the evidence in the light most favorable to the nonmoving party, in this case, plaintiff. *Ernsting*, 274 Mich App at 509-510.

We affirm the trial court's grant of summary disposition in favor of defendant on plaintiff's premises liability claim, reverse the trial court's grant of summary disposition in favor of defendant on plaintiff's ordinary negligence claim, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro